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1983-84 SEVENTH CIRCUIT DEVELOPMENTS REGARDING THE SHERMAN ACT, THE ROBINSON-PATMAN ACT AND RES JUDICATA

During the 1983-84 term, the Seventh Circuit dealt with a great variety of antitrust issues. In the areas of per se and rule of reason applications, tying arrangements, price discrimination and res judicata of antitrust claims, the court set new and significant trends for the circuit.

I. SHERMAN ACT § 1 VIOLATIONS

There are three criteria that must be met in order for an activity to be deemed illegal under Section 1 of the Sherman Act.[1] First, there must be some form of concerted action. Second, there must be a restraint of trade or commerce. And third, there must be an interstate commerce nexus.[2] Each of these factors was the subject of controversy in the 1983-84 term and will be discussed below.

A. Conspiracy

The first element of a Sherman Act § 1 violation was found lacking in *O'Byrne v. Cheker Oil Co.*[3] Accordingly, the Seventh Circuit affirmed the district court's summary judgment in defendants' favor.[4] The plaintiffs alleged that the two defendant oil companies, Cheker and Marathon, conspired to drive their independent dealers out of business by increasing their operation costs, and thereby converting all retail operations to exclusive company control.[5] Although it did find that Cheker had taken steps to implement the scheme, the court refused to find that Marathon

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1. 15 U.S.C. § 1 (1982).

2. Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

3. 727 F.2d 159 (7th Cir. 1984).

4. *Id.* at 162.

5. *Id.*

had taken any part.[6] Therefore, because there was no concerted action, there was no conspiracy.

Both the district court and the Seventh Circuit accepted the affidavits and deposition testimony offered by Marathon which demonstrated that it played no part in Cheker's conversion from wholesale to retail operations.[7] In so doing, they rejected the inference of conspiracy which the independent dealers attempted to establish from the fact that Marathon owned 50% of Cheker's stock.[8] Basically, the court was looking for some *direct* evidence which would refute defendants' affidavits and testimony by proving that responsibility for Cheker's day-to-day operations was jointly within the control of Cheker and Marathon officials.[9] However, because no such direct evidence was found in the record, the summary judgment in favor of defendants was affirmed.

O'Byrne is not the first case in which the Seventh Circuit refused to infer a conspiracy from circumstantial evidence. Rather, *O'Byrne* is in line with several cases decided in previous Seventh Circuit terms which have indicated that, absent an overwhelming showing of parallel behavior or other circumstances indicating a common purpose, the court will not infer a conspiracy. For instance, in *Quality Auto Body, Inc. v. Allstate Insurance Co.*,[10] the court refused to find a price-fixing conspiracy between two defendant insurance companies. These companies each established a method for estimating the amount of money it would pay to repair damage covered under their policies.[11] The plaintiff requested the court to infer a conspiracy on the ground that the defendants adhered to a *common* formula for calculating these repair estimates.[12] Nevertheless, the argument seeking to establish a conspiracy by inference was found

6. *Id.* at 164.

7. *Id.* at 162. For instance, the manager of Marathon's wholesale marketing division stated in an affidavit that "Marathon has never agreed or conspired with Cheker in any way to unlawfully restrain trade. . . ." *Id.* at 163.

8. There were only two facts illuminated in the opinion which could conceivably lead to a conspiratorial link between the parties: (1) that both defendants sell gasoline, and (2) that Marathon acquired 50% of Cheker's outstanding stock. *Id.* at 162. The court was apparently referring to this circumstantial evidence when it stated that "the facts upon which plaintiffs rely to support their Sherman Act conspiracy allegations are not susceptible of the interpretation they seek to give them." *Id.* at 163.

9. The court stated that the plaintiffs were unable to "substantiate" their claims of conspiracy and that they had no "evidence" of a conspiracy. *Id.* at 163. However, if the plaintiffs had been able to demonstrate that Cheker's policies were implemented in the normal course of business only after joint approval by Cheker and Marathon management, then summary judgment may have been found inappropriate since "evidence" of concerted action could thus have been presented at trial.

10. 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

11. *Id.* at 1197-98.

12. *Id.* at 1200. In other words, the plaintiff argued that use of a similar formula constitutes parallel behavior sufficient to establish a conspiracy. *Id.* at 1200-01 (the assumption being that two parties could not independently develop the same procedure).

unpersuasive in *Quality Auto* for the same reason that it was found unpersuasive this term in *O'Byrne*—uncontroverted affidavits and testimony were offered by the defendants stating that they had not conferred.[13]

O'Byrne is also consistent with *United States v. Standard Oil Co.*,[14] which was decided during the Seventh Circuit's 1963-64 term. In *Standard Oil*, another form of parallel behavior was found insufficient to establish a conspiracy. Defendant gas companies raised their prices after defendant Standard Oil made an announcement that it intended to raise its prices to effect an end to the existing price war. The court concluded that the defendants' actions did not automatically constitute a conspiracy. Rather, they were entitled to act as their interests dictated, so long as the act did not stem from an understanding or agreement.[15] Thus, *Standard Oil* also teaches that parallel behavior alone is rarely sufficient ground on which to find a conspiracy.[16]

There has been, however, at least one case in relatively recent Seventh Circuit history (1974-75 term) in which the circumstances surrounding the alleged conspiratorial action were compelling enough to warrant an inference of conspiracy. In *United States v. Finis P. Ernest, Inc.*,[17] the defendant contractor submitted a construction bid which was rejected for being too high. In this first round of bidding, defendant Ernest bid alone; however, in the second round both defendant Ernest and defendant Modern participated. The plaintiff asked the court to consider several circumstantial facts regarding this second round of bidding in determining whether a conspiracy existed. First, seven of the sixteen items and corresponding price quotes in the defendants' bids were identical, while the remainder of Modern's quotes were only slightly higher. Furthermore, of those nine remaining quotes, seven of Modern's were the same as Ernest's quotes rounded to a higher figure, while another differed by exactly one dollar. Finally, Modern had other obligations which would have made acceptance of this job impossible if awarded.[18] Thus, on the basis of these circumstances, the court found the evidence was substantial enough to support the jury's implicit finding that the defend-

13. In *Quality Auto*, specifically, the testimony and affidavits stated that claim handling procedures were developed unilaterally. *Id.* at 1200.

14. 316 F.2d 884 (7th Cir. 1963).

15. *Id.* at 896.

16. In both *Quality Auto* and *Standard Oil*, the Seventh Circuit quoted from Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954), in which the United States Supreme Court stated that it "has never held that proof of parallel business behavior . . . itself constitutes a Sherman Act offense."

17. 509 F.2d 1256 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975).

18. *Id.* at 1262.

ants had conspired.[19]

Quality Auto, Standard Oil and *Ernest* taken together illustrate that the Seventh Circuit has historically placed a heavy burden of proof on a plaintiff attempting to demonstrate the existence of a conspiracy. Furthermore, this term, in *O'Byrne*, the court acted entirely consistent with these prior findings by refusing to accept a presumption of concerted activity on the basis of a stockholder's relationship.

B. Restraint of Trade

The United States Supreme Court recently stated that a literal reading and application of the Sherman Act § 1 would serve to invalidate the "entire body of private contract law."[20] In effect, the Act makes illegal any conduct which restrains trade, provided only that it involve some form of concerted activity and has a connection with interstate commerce.[21] For this reason, the Act was long ago tempered significantly by what has been termed the "rule of reason."[22] This rule calls for an examination of the reasonableness of the effect of the challenged restraint on competition.[23] There is, however, an exception to the rule which would make a restraint illegal even without a showing of an anticompetitive effect. That is, some activity is considered so destructive of free competition that the requisite suppression of competition is presumed and the activity is found to be a "per se" antitrust violation.[24] In the 1983-84 term, the Seventh Circuit had the opportunity to discuss both rule of reason and per se antitrust violations.

1. Per Se Applications

Although the Seventh Circuit has had many occasions to consider whether a particular activity constituted a per se Sherman Act viola-

19. *Id.* at 1261. The court quoted from Glasser v. United States, 315 U.S. 60, 80 (1942), in which the Supreme Court stated that participation in a conspiracy need not be proved by direct evidence, but rather may be inferred from a collection of circumstances.

20. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978).

21. *See supra* note 1.

22. The rule of reason was articulated in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), in which the United States Supreme Court stated that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.* at 238. Although this test was not expressly labelled the "rule of reason" in *Chicago Bd. of Trade*, subsequent Supreme Court decisions have entitled it so. *See, e.g.*, Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).

23. *Id.* at 688.

24. Some of the practices found to be per se illegal are price fixing, division of markets, group boycotts, and tying arrangements. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

tion,[25] it had never before detailed the manner in which the question should be submitted to a jury. However, during the 1983-84 term, in *Wilk v. AMA*,[26] the court offered a general format to be followed in such cases. Furthermore, the court addressed the more specific question of when a boycott might constitute a per se violation.

In *Wilk*, various chiropractors sued a number of medical associations and doctors,[27] claiming a conspiracy and consequent group boycott to eliminate the chiropractic profession. The group boycott was allegedly implemented through an agreement to: (1) induce medical doctors, hospitals and other health care facilities to forego any form of professional, research, or educational association with chiropractors, and (2) induce prospective patients to avoid seeking chiropractic services.[28] The impetus for this boycott was allegedly Principle 3 of the AMA Principles of Medical Ethics which provides that a "physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate with anyone who violates this principle."[29]

At the plaintiffs' request, the issue of whether the boycott constituted a § 1 violation was submitted to the jury by means of per se instructions which were paraphrased by the Seventh Circuit as follows:

(1) To establish per se unlawfulness, plaintiffs were obliged to show:

25. *See, e.g.*, Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 104 S. Ct. 1404 (1984); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981); Trabert and Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477 (7th Cir. 1980); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Moraine Products v. ICI America, Inc., 538 F.2d 134 (7th Cir.), *cert. denied*, 429 U.S. 941 (1976).

26. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984).

27. The defendants in *Wilk* included the AMA, the American Hospital Association, the American College of Surgeons, the American College of Physicians, the Joint Commission on Accreditation of Hospitals, the American College of Radiology, the American Academy of Orthopaedic Surgeons, the Illinois State Medical Society, H. Doyl Taylor (director of the AMA Department of Investigation and secretary to the AMA Committee on Quackery), Joseph A. Sabatier, M.D. and H. Thomas Ballantine, M.D. (both served on the AMA Committee on Quackery) and James H. Sammons, M.D. (member of the AMA Board of Trustees).

28. 719 F.2d at 211. In 1963, the AMA Board of Trustees established a "Committee on Quackery" which considered "its prime mission to be, first, the containment of chiropractic and ultimately, the elimination of chiropractic." *Id.* at 213, quoting from, a memorandum to AMA Board of Trustees from Committee on Quackery, January 4, 1971. Thus, the Committee, along with the AMA's Department of Investigation, prepared and distributed numerous publications which were critical of chiropractic. In addition, the Committee was extensively involved in state and national legislative lobbying regarding chiropractic licensing and Medicaid/Medicare reimbursement for chiropractic services. Furthermore, the Committee sent letters warning medical boards and associations that professional cooperation between chiropractors and physicians was unethical. And finally, the Joint Committee on Accreditation of Hospitals, of which a number of defendant organizations were members, issued a manual which "asserted that a hospital permitting chiropractors to use its facilities would 'very probably' lose its accreditation." *Id.* at 213-14.

29. *Id.* at 213. In 1966, the AMA resolved that it "is the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease."

> (a) that defendants entered into 'a concerted refusal to deal, engaged in by the participants primarily or in large part for the purpose of excluding competitors from the market'; and (b) 'that the primary motivations for this refusal to deal were essentially commercial or economic in nature.'
>
> * * * *
>
> (3) [I]f you find that any of the boycott conspiracies which plaintiffs have alleged were entered into to contain or eliminate chiropractors or to injure them in their ability to compete . . . you may not consider whether the resulting restraint of trade was reasonable. . . .'[30]

The court held that these instructions were erroneous because they inadequately detailed the conduct which, if found to have occurred, would amount to a per se violation.[31] Furthermore, the instructions imposed upon the jury not only the burden of determining whether the alleged conduct occurred (which is properly its function), but also whether the conduct itself constitutes a per se violation. Because this latter determination is one of law, it is properly within the realm of the court.[32] Thus, the Seventh Circuit articulated the proper procedure to be followed henceforth: First, the trial judge must determine whether the alleged conduct (*e.g.* "A, B, C, and D") would constitute a per se violation; Second, if he determines that it would, he must then instruct the jury that it could find a per se violation occurred "only if it found that a particular defendant had done A, B, C, and D."[33]

"A concerted refusal to deal" (instruction 1) and "any of the boycott conspiracies which plaintiffs have alleged" (instruction 3) were found to be insufficient descriptions of conduct on the basis of which a jury could find a per se violation.[34] However, the court went even further and held that the issue of this particular boycott should not have been submitted to the jury under a per se analysis. In so holding, the court reiterated its position that "boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price fixing agreements."[35] Thus, because the boycott here was the *end* to be achieved, as opposed to the *means* through which a potentially ille-

30. *Id.* at 220.

31. However, the court concluded that the error was not prejudicial to plaintiffs because the trial court should not have acceded to plaintiffs' request (over defendants' objection) to submit the per se question to the jury. *Id.* at 221. *See also* text accompanying notes 35-37.

32. 719 F.2d at 220.

33. *Id.*

34. The court suggested that in this case, descriptions such as "refusal to refer patients," "denial of access to hospitals" and "closing doors of educational programs" were required. *Id.* at 220.

35. *Id.* at 221, *quoting from*, Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 3553 (1984), and *citing*, United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-90 (7th Cir. 1981).

gal end would be achieved,[36] the anticompetitive effect was adjudged so uncertain as to require analysis under the rule of reason.[37]

The *Wilk* decision is consistent with Seventh Circuit precedent insofar as the court has previously manifested a reluctance to label an activity a "group boycott" and consequently conclude that a per se presumption of anticompetitive effect may be made.[38] For instance, in *United States Trotting Ass'n v. Chicago Downs Ass'n*,[39] the plaintiff (USTA) was a nonprofit organization dedicated to the establishment of uniform rules and standards in harness racing which were promulgated to alleviate widespread problems associated with the sport. In order to protect the system from those who sought to undermine it, two of the rules provided sanctions against members who raced at tracks unaffiliated with the USTA. These sanctions were imposed against the defendant race tracks because they attempted to undermine the USTA system by ceasing payment of dues while continuing to enjoy the benefits of membership. The defendants contended that the enforcement of the USTA rules against them amounted to a group boycott and was thus illegal.[40]

In *United States Trotting*, the court refused to find a per se violation because the express goal of the USTA rules was not to exclude competitors, but to ensure honest harness racing.[41] Similarly, in *Wilk*, the express goal of the AMA was not to eliminate competition, but to ensure competent patient care.[42] Thus, the Seventh Circuit has demonstrated that when a group boycott does not seek to eliminate competition, the activity must be analyzed under the rule of reason to determine whether the resulting restraint is unreasonable.

2. Rule of Reason Applications

The rule of reason, as articulated by the United States Supreme Court in *Chicago Board of Trade v. United States*,[43] has traditionally allowed consideration of "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained."[44] However, the Court went on to explain

36. For instance, if the boycott were used to compel someone to engage in illegal economic behavior such as price fixing, then the boycott would be illegal per se. 719 F.2d at 221.

37. *Id.*

38. *See, e.g.*, Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers Ass'n, 672 F.2d 1280 (7th Cir. 1982); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981).

39. 665 F.2d 781 (7th Cir. 1981).

40. *Id.* at 783-87.

41. *Id.* at 788-89.

42. *See supra* note 29.

43. 246 U.S. 231 (1918).

44. *Id.* at 238.

that these factors may be considered, not because a showing of good intention "will save an otherwise objectionable regulation," but rather because "knowledge of intent may help the court to interpret facts and to predict consequences."[45] Nevertheless, three years ago, in *United States Trotting*,[46] the Seventh Circuit used language that seemed to indicate a willingness to depart somewhat from the teachings of *Chicago Board of Trade*. In short, the court in *United States Trotting* cautioned against zealous use of per se determinations in group boycott situations for two reasons—first, because they preclude inquiry into the business necessity for the practice involved, and second, because they do not allow a consideration of whether the conduct went beyond the restraint necessary to accomplish whatever legitimate purpose is asserted.[47]

United States Trotting was remanded for consideration of the alleged illegal activity under the rule of reason. Therefore, the Seventh Circuit did not address the issue of whether the motivation for the USTA's sanctions could justify a finding of reasonableness even though such activity under other circumstances would constitute a Sherman Act violation. The opportunity to address this issue arose two years later when the defendant in *MCI Communications Corp. v. AT&T*[48] argued that under the rule of reason the trier-of-fact must consider all of the facts and circumstances bearing on the reasonableness of the conduct. The court's response to this argument, however, seemed effectively to close the opening made in *United States Trotting*. The court stated that the rule of reason confines consideration to the impact of the conduct on competitive conditions and does not allow inquiry into whether a policy favoring competition is in the public interest. Thus, the teachings of *Chicago Board of Trade* apparently remained intact until the opening of the 1983-84 term.

By the close of the 1983-84 term, the tension between *United States Trotting* and *MCI* was completely resolved. In *Wilk v. AMA*,[49] the Seventh Circuit expressly modified the rule of reason test for cases involving questions of medical ethics. Consideration of intent may now influence a finding of reasonableness. The court felt that this landmark decision was possible because the Supreme Court reserved "freedom to discriminate between nonprofessional and professional activities, in construing and applying the Act."[50] Thus, although the modification at present is

45. *Id.*
46. 665 F.2d 781 (7th Cir. 1981).
47. *Id.* at 790.
48. 708 F.2d 1081, 1138-39 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983).
49. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). (*See* notes 27-29 and accompanying text for the facts of the case).
50. *Id.* at 226. In support of its statement, the Seventh Circuit quoted from *Goldfarb v. Virginia*

strictly applicable only in cases involving medical ethics, there is reason to believe that the result in *Wilk* will eventually be extended to include cases involving other public service professions.

The new test requires plaintiffs to demonstrate, as before, that competition is restricted. If plaintiffs are successful, a prima facie showing has been made that the restraint was unreasonable. Defendants then have the burden of rebutting the presumption of unreasonableness[51] by showing: first, that they are genuinely concerned about the use of scientific methods in the care of all their patients; second, that this concern is objectively reasonable; third, that this concern was the motivating factor behind the conduct intended to implement Principle 3 of the AMA Principles of Medical Ethics;[52] and fourth, that this concern could not have been adequately satisfied in a manner less restrictive of competition. If defendants successfully meet this burden, then the conduct is deemed reasonable and no Sherman Act § 1 violation will be found.[53]

In *Wilk*, the jury verdict for the defendants was reversed and the case remanded for consideration under this interpretation of the rule of reason.[54] On remand, the defendants' greatest difficulty in sustaining a finding of reasonableness will be presented by the first of the four requirements outlined above: that is, whether the various defendants were motivated by a concern that scientific method be used in the care of their patients. In this regard, the court identified three possible motives behind the defendants' conduct, two of which would not support a finding of reasonableness. First, they could have been acting to eliminate competition and thereby increase profits (the "money motive"). Second, they could have been acting in the public interest to eliminate the "threat" posed by chiropractic to public health, safety and welfare (the "public interest motive"). Third, they could have been acting to avoid jeopardiz-

State Bar, 421 U.S. 773, 788-89 n. 17 (1975), in which the Supreme Court stated that: "The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another contest, be treated differently." Note that *United States Trotting* in effect dealt with a public service profession, while *MCI* did not. This fact likely explains why the court seemed willing to consider motivation and effect in the former, but not the latter.

51. Defendants' burden does not constitute an affirmative defense and therefore need not be pleaded. 719 F.2d at 227.

52. *See supra* note 28 and accompanying text.

53. 719 F.2d at 227.

54. *Id.* at 229. Although the district court itself departed from precedent by allowing the jury to consider the defendants' motives under the rule of reason, the Seventh Circuit held that the jury instructions were prejudicially erroneous in two respects. First, they did not clearly define what motives could be found acceptable under the modified test (*see supra* notes 54-55 and accompanying text); and second, they did not define the manner in which the motive was to be weighed (*e.g.*, the least restrictive means requirement).

ing the health of their *personal* patients by refusing to associate professionally in their care with those who do not practice a scientific method (the "patient care motive").[55]

The money motive would be found unacceptable because a desire to eliminate competition in an effort to realize greater profit does nothing to advance the public interest and therefore does not satisfy the modified test. Similarly, the public interest motive would be deemed unacceptable because a determination of whether chiropractic threatens the general public can be made only by Congress and state legislatures. However, the court implies that if the patient care motive were found to be the defendants' true concern, their activities would then be justified.[56]

Although motivation was found to be a proper concern in *Wilk*, a discussion of motivation would not be justified in the majority of Sherman § 1 cases.[57] For instance, in another rule of reason case decided during the 1983-84 term, *Bunker Ramo Corp. v. United Business Forms, Inc.*,[58] the court was not confronted with a professional activity. Therefore, the alleged illegal conduct was analyzed by the one-step rule of reason as articulated by the United States Supreme Court in *Chicago Board of Trade*.[59] In so doing, the Seventh Circuit reversed the district court's finding and held that the plaintiff's complaint failed to state a Sherman Act § 1 cause of action because no anticompetitive effect was alleged.[60]

Bunker Ramo serves to illustrate the proposition, as advanced in earlier Seventh Circuit cases, that pleadings will not be construed so liberally as to infer material elements of an antitrust cause of action.[61] This particular case involved an alleged conspiracy to "fix the price" of forms sold to Bunker Ramo at an "artificially high, non-competitive price."[62] The alleged violation involved the ordering of forms from the defendant by one of the plaintiff's employees who had been bribed for his participation in the scheme. Although the forms were never delivered, the plaintiff's employee submitted falsified invoices for the orders on which the

55. *Id.* at 219.

56. *Id.* at 228.

57. Except to the extent that knowledge of intent is used to interpret facts and predict consequences. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Seventh Circuit limited use of the modified test to cases "involving a certain kind of question of ethics for the medical profession." 719 F.2d at 226.

58. 713 F.2d 1272 (7th Cir. 1983).

59. *See supra* note 22. The traditional *Chicago Bd. of Trade* one-step rule makes illegal any restraint that suppresses competition. 246 U.S. at 238.

60. 713 F.2d at 1285.

61. *See infra* notes 64-65 and accompanying text.

62. 713 F.2d at 1279.

plaintiff relied in paying the defendant for the non-delivered forms.[63] On the basis of these facts and the "bare allegation" that the plaintiff was charged an "artificially high, non-competitive price," the court refused to find that an anticompetitive effect sufficient to satisfy the rule of reason had been claimed.

Similiar pleadings in past terms have been found insufficient to state an antitrust cause of action. For instance, in *Havoco of America, Ltd. v. Shell Oil Co.*,[64] the plaintiff's allegations of conspiracy were deemed conclusionary because no supporting facts were claimed. In fact, the record was devoid of any allegations upon which the court could even infer that a conspiracy existed.[65] Such a conclusionary charge of conspiracy also defeated the plaintiff's pleadings in *Fabert Motors, Inc. v. Ford Motor Co.*[66] for the same reason. Thus, even though the Federal Rules of Civil Procedure require mere notice pleading,[67] the Seventh Circuit has demonstrated a reluctance to find that a cause of action has been made out when an antitrust element has not been pleaded specifically and supported with some factual allegation.[68]

Wilk and *Bunker Ramo* addressed relatively generalized issues regarding the rule of reason. *Wilk* dealt with a modification of the requirements of the test itself, while *Bunker Ramo* dealt with the sufficiency of an allegation required to meet the test. The last rule of reason case to be discussed below, however, was different in that it dealt with a specific category of activity and required a determination of whether the alleged conduct fit within that category such that it would be held unreasonable.

3. Tying

During the 1983-84 term, *Johnson v. Nationwide Industries, Inc.*[69] presented the court with its first opportunity to determine whether a tying arrangement[70] exists between the sale of a condominium unit and

63. *Id.* at 1275.

64. 626 F.2d 549 (7th Cir. 1980).

65. *Id.* at 558.

66. 355 F.2d 888, 890 (7th Cir.), *cert. denied*, 384 U.S. 939 (1966).

67. Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

68. Most likely the court requires seemingly higher standards of pleading due to the particularly high stakes involved in antitrust actions (i.e. treble damages). However, the court granted Bunker Ramo leave to amend, 713 F.2d at 1285, thus demonstrating that it is concerned that such grave charges be heard if there is some demonstrated basis to them.

69. 715 F.2d 1233 (7th Cir. 1983).

70. A tying arrangement conditions the sale of a tying product upon the buyer's purchase of a distinct tied product. Because the arrangement tends to eliminate competition for the tied product, it is generally held illegal as creating a per se anticompetitive effect. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6-7 (1958).

requisite share of a building management contract[71] when the management contract is entered into by the developer on behalf of future purchasers before the building has reached full capacity. The only issue involved in this case was whether such a sale involved one product or two. In isolating the two possible outcomes, the court stated that it could either find: (1) a presumption that one product exists, which is rebuttable by a showing that the contract runs for a reasonable length of time; or (2) that there are two tied products forming a lawful arrangement provided the contract runs for a reasonable length of time.[72] Thus, in either case a finding of lawfulness would be dependent upon the reasonableness of the contract's duration. Citing authority from similar condominium cases on both sides of the issue,[73] the Seventh Circuit affirmed the district court's denial of the defendants' motion for summary judgment,[74] and held that in such cases only one product is involved, provided the contract is of reasonable duration.[75]

The result in *Johnson* demonstrates the Seventh Circuit's willingness to consider the economic realities involved in as well as the public benefits to be gained from a tying situation before ruling on its legality vis-a-vis a restraint of trade. Some of the realities and benefits considered in *Johnson* were: (1) that "[p]rospective purchasers are reluctant to purchase in a building not professionally managed"; (2) that "proper management helps protect the developer against loss in value of unsold unit"; and (3) that "[l]enders generally require such contractual arrangements."[76] In *Johnson*, these considerations led the court to a constructive determination that a tying arrangement did not exist. Similarly, in

71. A condominium unit purchaser buys, in addition to his unit, a tenancy in common in the shared areas which include hallways, elevators and ground. He therefore must pay a percentage of the cost to maintain these areas. 715 F.2d at 1234 n. 3.

72. *Id.* at 1237. Although the latter result might appear somewhat unorthodox given that tying arrangements have been characterized as per se violations, as a practical matter courts have been willing to "consider justifications for the challenged conduct in an analysis of economic effect." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 77 (2d ed. 1984).

73. Foster v. West Alexandria Properties, Inc., 1980-1 CCH Trade Cases ¶ 63,223 (E.D. Va. 1980) (holding that only one product was sold); Jones v. 247 East Chestnut Properties, 1975-2 CCH Trade Cases ¶ 60,491 (N.D. Ill. 1974) (holding that two products were sold).

74. 715 F.2d at 1237. The district court also had concluded that the reasonableness of the management contract was a factual issue. *Id.* at 1235.

75. *Id.* at 1237. In *Johnson*, the contract was to extend five years beyond the date the building reached 80% occupancy. *Id.* at 1235. However, because this case was an appeal of a denial of summary judgment, the court had no need to determine whether five years beyond 80% occupancy was a reasonable duration. In *Foster*, 1980-1 CCH Trade Cases ¶ 63,223, eleven months beyond 75% occupancy was held reasonable, while in *Jones*, 1975-2 CCH Trade Cases ¶ 60,491, five years beyond 100% occupancy was held unreasonable. Given that the duration in *Johnson* falls within these two examples, even if the court continued to rely on their authority, it is difficult to anticipate which way the Seventh Circuit would rule should the issue of reasonable duration come before it.

76. 715 F.2d at 1236.

an earlier Seventh Circuit case, *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*,[77] the court found by applying the rule of reason test that a copyright licensing system did not constitute a tying arrangement.[78] However, before reaching this result using a restraint of trade analysis, the court undertook a fairly extensive exposition of the benefits to be gained from such an arrangement.[79] Although the rule of reason analysis set forth substantiated the determination that no tying arrangement existed, the lengthy commentary devoted to the arrangement's virtues tends to suggest that a different result might have been reached if it were not so beneficial. Accordingly, the result in *Johnson* is philosophically consistent with prior Seventh Circuit reasoning.

In general, the restraint of trade cases considered by the Seventh Circuit in the 1983-84 term produced some significant results, including: (1) a newly defined procedure for submitting the per se question to the jury (*Wilk*); (2) a substantial modification of the rule of reason test (*Wilk*); and (3) the determination that an arrangement held in other circuits to involve tying is not automatically to be so considered in the Seventh Circuit (*Johnson*).

C. *Interstate Commerce Nexus*

Bunker Ramo Corp. v. United Business Forms, Inc.,[80] was discussed above in connection with the restraint of trade requirement under the rule of reason.[81] However, the court actually began its Sherman Act analysis with a discussion of the interstate commerce nexus. The activity which allegedly violated the antitrust laws involved the fictitious delivery of forms for which the plaintiff paid the defendant. In a motion to dismiss, the defendants argued that because the forms were neither delivered nor intended to be delivered, they did not involve or affect interstate

77. 1982-1 CCH Trade Cases ¶ 73,460 (7th Cir. 1982).

78. *Id.* at ¶ 73,465-66. The plaintiff had originally licensed to Catholic parishes the right to copy songs for use in their hymnals at a rate of two cents per copy. As a result of widespread infringement, the plaintiff instituted its Annual Copying License (ACL) which was at issue in *F.E.L. Publications*. The ACL allows copying of an unlimited number of the songs offered by plaintiff for a single fee of $100 per year regardless of the number of songs used. *Id.* at ¶ 73,461. The district court found that the ACL involved a tying arrangement because in order to license the plaintiff's most popular songs, the defendant had to license the less popular songs as well. *Id.* at ¶ 73,464.

79. *Id.* at ¶ 73,465. The Seventh Circuit noted that this arrangement was a "reasonable and flexible tool for dealing with the unique problems associated with the Roman Catholic liturgical music market." Specifically, it protects and compensates copyright holders, allows parishes to produce reasonably priced hymnals, and obviates the need to monitor each customer for possible infringing activities. *Id.*

80. 713 F.2d 1272 (7th Cir. 1983).

81. *See supra* notes 58-63 and accompanying text.

commerce.[82] The district court denied the motion to dismiss on this issue and the Seventh Circuit affirmed.[83] However, in holding that there was an allegation of an interstate commerce nexus sufficient to justify a trial on this issue, the Seventh Circuit expressly reserved judgment on the question of the type of activity which will satisfy the requirement.[84]

Two categories of activity have been identified by the courts and found to satisfy section 1 of the Sherman Act when they affect interstate commerce: (1) the challenged activity itself, and (2) the defendant's general business activity independent of the violation. While many jurisdictions accept that only the former activity must affect interstate commerce before a Sherman Act violation will be found,[85] there are those which will additionally accept the latter category.[86] Unfortunately, the Supreme Court has never clearly articulated whether a business which engages in a local conspiracy can be held liable under federal antitrust laws because that business also engages in interstate commerce.[87] Consequently, the Seventh Circuit has demonstrated a reluctance to do so.

The Seventh Circuit's reluctance to rule on the issue of whether a defendant's general business activity is sufficient to satisfy the interstate commerce requirement is evidenced by the fact that this is not the first term in which the court has reserved judgment on the matter. In 1975, the court stated that it need not resolve the issue at that time because it was convinced that there was sufficient evidence in that case to support a finding of jurisdiction under either approach.[88] As of 1975, however, the court seemed to lean toward a requirement that the restraint itself act upon interstate commerce because of past Supreme Court language bear-

82. 713 F.2d at 1280.

83. *Id.* at 1289-90. The complaint was dismissed on other grounds with leave to amend. *See* text accompanying notes 59-60.

84. 713 F.2d at 1282.

85. *See* Furlong v. Long Island College Hosp., 710 F.2d 922 (2d Cir. 1983); Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1981) (*en banc*); Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank, N.A., 649 F.2d 36 (1st Cir. 1981).

86. *See* Construction Aggregate Transport, Inc. v. Florida Rock Indus., 710 F.2d 752 (11th Cir. 1983); Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Note that the district court in *Bunker Ramo* relied on *Western Waste* in holding that a sufficient allegation of interstate commerce nexus had been made. 713 F.2d at 1280.

87. In *Bunker Ramo*, the court explained that the more recent cases taking an opposing stand on this issue are each interpreting the Supreme Court's decision in McClain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980): "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity." Some have narrowly interpreted this language to mean that only the challenged activity will be considered, while others believe that room is left for the defendant's business activities to be considered. 713 F.2d at 1280-82.

88. United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1260-61 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975).

ing on the issue.[89] Only time will tell which position the Seventh Circuit will finally adopt.

II. ROBINSON-PATMAN ACT § 2A: PRICE DISCRIMINATION

O'Byrne v. Cheker Oil Co.[90] was decided during the 1983-84 term and discussed above in connection with the conspiracy requirement of a Sherman Act § 1 violation.[91] In that regard, the court merely applied new facts to established law and therefore the case was not terribly significant. However, in analyzing the plaintiffs' Robinson-Patman Act count, new precedent was established in the circuit.

The plaintiffs in *O'Byrne* attempted to prove that Cheker had practiced price discrimination in the sale of gasoline between its independent dealers (plaintiffs) and its company-owned dealers in violation of the Robinson-Patman Act § 2A.[92] However, the Seventh Circuit upheld the district court's summary judgment in the defendants' favor because the Act requires a discrimination in price between different purchasers.[93] Although the plaintiffs' allegation implied that the independent and company-owned dealers constituted two categories of different purchasers,[94] *Security Tire and Rubber Co. v. Gates Rubber Co.*,[95] was cited to support the proposition that Cheker's company-owned dealers were not purchasers. *Security Tire* held that for purposes of the Robinson-Patman Act a parent cannot sell to its wholly-owned subsidiaries because they are one and the same entity.[96] Therefore, Cheker's only purchasers were the plaintiffs between whom there was no evidence of discrimination.[97]

O'Byrne turned on whether a parent and its wholly-owned subsidiary could be considered separate corporate entities such that goods could

89. *Id.* at 1260.

90. 727 F.2d 159 (7th Cir. 1984).

91. *See supra* notes 3-9 and accompanying text.

92. In relevant part, section 2A of the Robinson-Patman Act states that it is "unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality." The Act also includes restraint and interstate commerce requirements which were not at issue in *O'Byrne*. 15 U.S.C. § 13a (1982).

93. 727 F.2d at 164-65. The court cited American Oil Co. v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975), to support the proposition that "there is no violation unless discrimination is in price between different purchasers on the same level of competition." *See also* Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 7 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950), which states that "[t]here must be proof that a seller has charged one purchaser a higher price for like goods than he charged one or more of the purchaser's competitors."

94. The plaintiffs attempted to support their Robinson-Patman Act count by comparing the retail prices charged by company-owned stations with the wholesale prices charged by Cheker to the plaintiffs. 727 F.2d at 164.

95. 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

96. *Id.* at 967.

97. 727 F.2d at 164.

be "sold" as opposed to transferred by the parent to the subsidiary. The result here establishes that they cannot be so considered. Indeed, past Seventh Circuit opinions have agreed with this result in the context of the Sherman Act,[98] barring one important exception. In *Independence Tube Corp. v. Copperweld Corp.*,[99] the court held that enough separation was shown between the two defendant entities such that they could be considered independent and thus capable of conspiring for purposes of Sherman Act § 1.[100] Presumably, the same considerations would have led the court to reach a similar result in dealing with a question of Robinson-Patman discrimination, by finding that a parent and its wholly-owned subsidiary could under certain circumstances be capable of a buyer/seller relationship.

Of course, *O'Byrne* did not present the court with the opportunity to decide whether this proposition is true because Cheker and its company-owned stations were closely associated in their business dealings. Furthermore, whatever predilection the court might have felt toward reaching this result has been nullified by the Supreme Court in its recent reversal of *Independence Tube*.[101] In reversing *Independence Tube*, the Supreme Court held that a parent and its wholly-owned subsidiary must always be viewed as a single enterprise for purposes of the Sherman Act § 1.[102] Therefore, *O'Byrne* and *Independence Tube* together indicate that the Seventh Circuit will never consider a parent and its wholly-owned subsidiary to be separate entities for purposes of a Robinson-Patman price discrimination count.

98. *See* University Life Ins. Co. of America v. Unimarc, Ltd., 699 F.2d 846 (7th Cir. 1983); Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); PermaLife Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968). In each of these cases, the unitary nature of parents and affiliates was discussed in relation to their ability to conspire under section 1 of the Sherman Act. Although in each case the court held that the defendants were incapable of such a conspiracy because they were not sufficiently distinct entities, it did state in each case in dicta that under some circumstances a parent/subsidiary conspiracy was possible.

99. 691 F.2d 310 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

100. *Id.* at 320. Among the factors which influenced the court to determine that defendant Copperweld was capable of conspiring with its subsidiary were: (1) that they engaged in completely separate businesses; (2) that the subsidiary had real autonomy in day-to-day and policy decisions; (3) that the subsidiary's expenses and revenues were segregated; and (4) that the subsidiary had a separate sales force and clientele.

101. 104 S. Ct. 2731 (1984).

102. *Id.* at 2742. Although the Supreme Court did not specifically address the activity of a parent and its subsidiary in terms of the Robinson-Patman Act, the reasons set forth for the result indicate that in future it will be construed as relating to this Act: "A parent and its wholly-owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."

III. RES JUDICATA OF ANTITRUST CLAIMS

The result in *Marrese v. American Academy of Orthopaedic Surgeons*[103] represents an extremely significant departure from established case precedent regarding the availability of federal antitrust claims. In *Marrese*, the plaintiffs brought suit in state court claiming that the Illinois common law and the Illinois constitution required that the defendant Academy grant a hearing on their applications for membership, which had been previously rejected without a hearing or a statement of reasons. The suit was dismissed for failure to state a claim. After the appellate review process resulted in an affirmance, the plaintiffs brought suit in federal court alleging a Sherman Act § 1 violation resulting from the defendant's monopolistic practice.[104] The question before the Seventh Circuit was whether the plaintiffs' federal antitrust claims were barred by the doctrine of res judicata and the prior state action. In a plurality decision that motivated a lengthy concurrence and an even lengthier dissent, the court held that the action was barred because the antitrust claims could either have been heard in state court along with the other claims or brought contemporaneously in federal court.[105]

The holding in *Marrese* marks an admitted disavowal of authority from a great number of jurisdictions,[106] including a case directly on point which was decided by the Seventh Circuit itself.[107] Historically, as the dissent notes, the doctrine of res judicata bars litigation of an issue which has been adjudicated by a court of "competent" jurisdiction,[108] as well as those claims which "*could have been* brought in a prior litigation between the same parties arising from the same cause of action."[109] In this case, however, the plaintiffs' Sherman Act claims could not have been brought

103. 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S. Ct. 3553 (1984).

104. *Id.* at 1151.

105. *Id.* at 1156. Because certiorari has been granted, the Seventh Circuit's somewhat extraordinary holding may not stand.

106. *Id.* at 1153. The court cites the following cases and sources to demonstrate that there is "much authority that is at least superficially contrary": RX Data Corp. v. Department of Social Servs., 684 F.2d 192, 198 (2d Cir. 1982); Hayes v. Solomon, 597 F.2d 958, 984-85 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); RESTATEMENT (SECOND) OF JUDGMENTS § 26, illustration 2 (1980).

107. Kurek v. Pleasure Driveway & Park Dist., 583 F.2d 378, 379 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979): "Defendants' arguments that the antitrust claims have been adjudicated in state court proceedings are insupportable both because the state courts have not in fact purported to do so, and because jurisdiction of federal antitrust suits is exclusively in the federal courts."

108. 726 F.2d at 1175 (Cudahy J., dissenting), *quoting from*, Southern Pac. Ry. Co. v. United States, 168 U.S. 1, 48-49 (1897).

109. 726 F.2d at 1178 (Cudahy, J., dissenting), *citing*, Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981).

in the prior state proceedings because only federal courts have jurisdiction over federal antitrust laws.[110] The court's answer to this difficulty is that the plaintiffs had the opportunity to bring their antitrust claims under *Illinois* antitrust law because, as far as these particular plaintiffs were concerned, the liability standards under both Illinois and federal antitrust statutes are the same. Moreover, the court stated that although the available damages differ, that distinction is not important since these particular plaintiffs were not seeking damages, but rather to be admitted to the defendant association.[111]

Of course, if the plaintiffs did not wish to have their antitrust claims heard in state court, other alternatives were available to them. For instance, they could have brought an antitrust action in federal court with pendent state claims, or they could have brought simultaneous federal and state actions.[112] The practical procedural effect of the holding in *Marrese* is that plaintiffs in general must now consider from the outset bringing two suits, one in a federal and one in a state forum, if they do not wish to bring a state antitrust suit along with their state claims. Furthermore, if a plaintiff is unsure about bringing an antitrust suit, caution dictates that he bring the federal suit to "cover all bases." The result is that defendants in general may be faced with antitrust suits that might never have been brought had plaintiffs not been concerned about losing the future potential for a suit. Ironically, the result in *Bunker Ramo* discussed above (case dismissed for insufficient allegations of anticompetitive effect)[113] suggests that the court is reluctant to undertake adjudications of antitrust claims unless there is a firm base upon which the case is built from the outset, while the result in *Marrese* sanctions the bringing

110. Although the court questions whether courts actually do have exclusive jurisdiction over federal antitrust laws, it concedes that only the Supreme Court may determine whether a Sherman Act claim may be brought in state court. *Id.* at 1152-53.

111. *Id.* at 1153-56. The court relied on Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981), in which res judicata was held to bar a federal antitrust claim filed after the failure of a state antitrust action. However, in *Nash*, the state antitrust statute was identical to the federal statute, while in *Marrese* the laws were not identical. For instance, in Illinois a boycott is never illegal per se, while in federal court it is often a per se violation. *See supra* at n.24. Furthermore, in Illinois there is no automatic trebling of damages if an activity is found anticompetitive by the rule of reason as opposed to per se reasoning. Nevertheless, the court held that these distinctions were not important in *Marrese* because the plaintiffs in effect had charged a conspiracy to fix prices or limit output which are both per se offenses under both Illinois and federal law. Thus, in *Marrese* the liability standards were the same, and although the potential remedies were different, the distinction was held inconsequential because the plaintiffs were not seeking damages (as evidenced by the fact that they did not seek damages in the original state proceedings). *Id.* at 1155-56.

112. *Id.* at 1152.

113. *See supra* notes 60-63 and accompanying text.

of an increased number of suits.[114]

In sum, the 1983-84 term produced a number of significant antitrust holdings which indicate a willingness to break away from established precedent in order to reach a desired end.

114. Actually, the court hoped to reduce the number of suits brought by invoking the doctrine of res judicata and thus "insisting that people litigate their claims in an economical and parsimonious fashion." *Id.* at 1153. Furthermore, the court has clearly broken with precedent in order to enforce the spirit, but not the law, of res judicata which is to "protect a defendant from being worn down by a plaintiff who sues him over and over again for the same allegedly wrongful conduct." *Id.*